

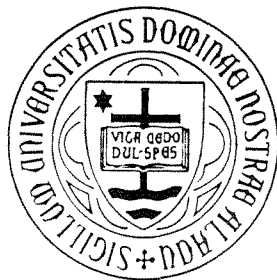
The Virtues and Limit of Codes in Legal Ethics

Vincent R. Johnson

Vincent R. Johnson, *The Virtues and Limit of Codes in Legal Ethics*, 14 Notre Dame J. L. Ethics & Public Pol'y 25 (2000).

Notre Dame Journal of Law, Ethics & Public Policy

The Virtues and Limit of Codes
in Legal Ethics
Vincent R. Johnson



Thomas J. White Center
on Law & Government
Notre Dame Law School

Volume 14

Issue No. 1, 2000

Reprinted from SYMPOSIUM ON ETHICS

THE VIRTUES AND LIMITS OF CODES IN LEGAL ETHICS

VINCENT R. JOHNSON*

I. ETHICS AT NOTRE DAME IN THE 1970S

I studied legal ethics at Notre Dame under Tom Shaffer, having entered the law school in 1975 during the first year of David Link's twenty-four-year deanship. Shaffer's classes routinely presented moments of exquisite dilemma. We spent hours pondering ethical problems, discussing and debating the difficult choices that lawyers face.

What should a lawyer do if a client commits perjury on the witness stand, or wants to disinherit a child, or seeks assistance with marketing a vile product, drafting a predatory lease, or investing in a politically repressive country? Or suppose a truthful statement to the press about the non-enforceability of a police promise might cause a hostage-taker learning of the statement to execute the captives. Or what if a lawyer knows about an unfortunate loophole in the anti-discrimination laws and a client asks for advice?

Almost a quarter of a century later, I remember the issues and I remember the discussions. But I do not remember many clear answers. Often there seemed to be multiple answers, and sometimes no answers at all. Either way, solutions did not come easily. That may have been the point. The message, as best I understood it, was that for lawyers seeking to do the right thing there are no simple answers to ethical questions. Resolving such dilemmas required weighing deliberation and clear, mature judgment. Ethical problem-solving, we learned, depended on the lawyer's character and skill in making moral choices.¹ The deci-

* J.D., University of Notre Dame; LL.M., Yale University; LL.D., St. Vincent College (Pa.). Professor of Law and Director of the Institute on World Legal Problems, St. Mary's University, San Antonio, Texas. Member, American Law Institute. Fulbright Scholar, Renmin University of China, Beijing, 1998. Chair, Mayor's Task Force on Ethics in Government, San Antonio, Texas, 1997-98. Member, Texas Disciplinary Rules of Professional Conduct Committee, State Bar of Texas.

1. See Thomas L. Shaffer, *On Being a Professional Elder*, 62 NOTRE DAME L. REV. 624, 630 (1987) ("When character is in place, fortified by 'a few rules' that have to do with professional craft, the professional person becomes dependable. Professional character is the connection between virtue and craft.").

sion-making process was arduous and uncertain, but it provided an opportunity for moral growth. At Notre Dame, being a good person, as well as a good lawyer, was a stated goal. And one quickly learned that that was no easy feat. As taught by Tom Shaffer, the subject of legal ethics was tantalizing and inspiring, and the fulfillment of one's professional obligations always threatened to be unachievable.

I am sure that my classmates and I paid some attention to the Code of Professional Responsibility in Shaffer's class, but the code did not loom large. Mere adherence to codified professional standards did not hold much promise for young professionals who were urged to aspire to a goal much higher than legal compliance. There was more to professional ethics than interpreting the words of a statute.

Legal ethics with Tom Shaffer was moral philosophy with a religious orientation. At Notre Dame, that was not surprising. In the mid-1970s, morality and religion played a prominent role in the life of the law school. Contracts class began with recitation of the Our Father, Torts with a Hail Mary, Masses were occasionally celebrated in the student lounge, and the final paper in Property required students to trace rules from the Anglo-American property system to their roots in the Judeo-Christian Tradition.

II. THE TWENTIETH CENTURY SHIFT FROM MORAL REASONING TO LEGAL COMPLIANCE

In the hands of a master, before the right audience, legal ethics taught as moral philosophy is a thing of great beauty and infinite worth. In other hands, or before other audiences, it can be a failed pedagogy, engendering resentment in students, frustration in professors, or both.

One alternative is to teach legal ethics as law, rather than as ethics.² Indeed, at the threshold of the new millennium, nothing could be more natural. The twentieth century in America was an era of rampant statutorification.³ The uncertain contours of the

2. It is possible to think of other terms to differentiate the ways in which legal ethics is taught. See, e.g., Vincent Robert Johnson, *Law-givers, Story-tellers, and Dubin's Legal Heroes: The Emerging Dichotomy in Legal Ethics*, 3 GEO. J. LEGAL ETHICS 341, 342 (1989) (distinguishing between "law-givers," who "view legal ethics as chiefly concerned with the identification, transmission, and enforcement of uniform standards governing the conduct of lawyers," and "story-tellers," who "place a higher value on persons and context than on principles and procedures, and on the cultivation of a deeper, less mechanical sense of professionalism than detailed rules can provide").

3. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982) ("The last fifty to eighty years have seen a fundamental change in

common law, in many fields, were refined or replaced with detailed legislation.⁴ A similar metamorphosis took place in the field of attorney responsibility.⁵ The professional standards which at the beginning of the 1900s took the form of aspirational principles for good deportment⁶ had by the end of the century been transformed into hard-edged rules of law.⁷ Forged in heated debate, codified with precision, and routinely invoked by disputants, the principles of legal ethics are today regularly enforced by courts and administrative bodies as rules of law.⁸ As

American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law.”).

4. See Ellen Ash Peters, *Common Law Judging in a Statutory World*, 43 U. PITT. L. REV. 995, 998 (1982) (observing that “statutes have become ubiquitous”). See also Vincent R. Johnson, *America’s Preoccupation with Ethics in Government*, 30 ST. MARY’S L.J. 717, 752-53 (1999):

At the beginning of the 1900s, statutes were unusual features in American law. Courts made most of the law through *ad hoc* adjudication of disputes. With the rise of the social welfare state during the twentieth century, legislation became increasingly important. Today, statutes are a bulwark in American law and address virtually every conceivable subject, ranging from the sale of securities, to the operation of aircraft, to liability for consumer fraud. In fact, it is difficult to think of any dispute or problem that remains untouched by legislation . . .

5. See Brenda Smith, *Civility Codes: The Newest Weapons in the “Civil” War over Proper Attorney Conduct Regulations Miss Their Mark*, 24 U. DAYTON L. REV. 151, 156 (1998) (“The three model codes of conduct promulgated by the ABA [during the twentieth century] show a movement from a mere ‘aspirational guide’ in the [1908] Canons, to a combination of aspiration and discipline in the [1969] Code, to finally, a more rigid ‘ethical framework’ in the [1983] Rules.”).

6. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 54 (1986) (“The 1908 Canons . . . were not originally adopted in order to serve as a regulatory blueprint for enforcement through disbarment and suspension actions. Instead, they seem to have been a statement of professional solidarity.”). The early ethical codes for lawyers contained principles, not rules. See Thomas L. Shaffer, *The Legal Profession’s Rule Against Vouching For Clients: Advocacy and “The Manner That Is the Man Himself”*, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 145, 160 (1993) (“The difference is that a rule can only be followed or broken; principles are more flexible.”).

7. The American Bar Association’s promulgation of the Model Code of Professional Responsibility in 1969 was a milestone in the transformation of principles of legal ethics into enforceable rules of law. State rules patterned on the Code were widely enacted. See WOLFRAM, *supra* note 6, at 56 (“In contrast to the 1908 Canons which were only slowly adopted in some states, the 1969 Code was an impressive and quick success The Code acquired the force of law when it was adopted in a jurisdiction by state authority, typically the state’s highest court.”).

8. Court decisions involving issues arising under state attorney ethics codes are reported bi-weekly in the Current Reports section of the ABA/BNA *LAWYER’S MANUAL OF PROFESSIONAL CONDUCT*. Disciplinary actions are fre-

viewed from many perspectives, legal ethics is now focused heavily on uniform compliance with codified rules, rather than on individual decision-making based on moral principles. There are many indicia of the shift. Some of the more visible developments of the current preeminence of codified rules are the continuing revision of codified standards,⁹ the widespread use of a standardized professional responsibility exam as a precondition for admission to practice,¹⁰ the proliferation of rule-oriented ethics treatises,¹¹ and the adoption of a new Restatement of the Law Governing Lawyers.¹²

III. SHAFFER'S CRITICISM

The transformation of attorney professional ethics into a field of legal regulation has not gone without question. Tom Shaffer has been prominent among the critics. Addressing this phenomenon, he has written that:

Americans in the late twentieth century evade moral discussion of what they are about. . . . [T]his is true of law students in "professional responsibility" courses, as it is of law faculties and lawyers in practice. The methods of evaluation are diverse but consistently banal. They include resolutions that dig no deeper than rules of practice imposed by courts—rules which virtually everyone identifies as ethi-

quently listed in bar journals or legal newspapers. See, e.g., *Discipline*, TEX. LAW., Aug. 23, 1999, at 15 (reporting disciplinary sanctions imposed on four lawyers).

9. In Texas, for example, the process of "reforming" attorney ethics rules never ends. See Janet Elliott, *Texas Supreme Court Tosses Bar Referendum*, TEX. LAW., June 28, 1999, at 4 (discussing 1998 ethics reform referendum); Bob Schuwerk, *Texas Disciplinary Rules of Professional Conduct*, 62 TEX. B.J. 715 (1999) (discussing a proposed complete revision of the Texas disciplinary rules governing conflict of interest); *Texas Bar Journal Celebrating 60 Years of Service to The Lawyers of Texas*, 61 TEX. B.J. 48 (1998) (discussing referenda in 1989 and 1994 that substantially revised the ethics rules).

10. 52 American jurisdictions require applicants for admission to the bar to take the Multistate Professional Responsibility Exam. See Colorado Bar Refresher, *Multistate Professional Responsibility Exam* (visited Feb. 5, 2000) <www.cpe-cbr.com/BarReview/mpreexam.htm>.

11. The best example is GEOFFREY HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING*, (2d ed. 1990 & Supp. 1998), the organization of which directly corresponds to the ABA Model Rules of Professional Conduct.

12. See *Attorneys' Standards of Conduct: Restatement On Lawyers Completed With Final ABA Approval of All Sections*, 66 U.S. L. WK. 2716 (May 26, 1998) (discussing the adoption of the Restatement, Third, of the Law Governing Lawyers).

cally inadequate, or labels as a superficial moral minimum, or both. . . .¹³

Shaffer urges that:

[M]ost American attorneys should ignore most of what my colleagues . . . [in the field] say about legal ethics, and should regard official "ethics" rules for attorneys the way they regard the motor vehicle code—as an administrative regulation having very little to do with being righteous and an attorney simultaneously.¹⁴

Assessing the current state of affairs, Shaffer laments: "The claim that a lawyer must obey his conscience (and that his conscience is one conscience, at home or in town) fades a little more every time the profession recodifies its rules of professional behavior."¹⁵ "Somewhere between [David] Hoffman's day (he died in 1854) and our own, professionalism stopped meaning that lawyers are responsible for justice."¹⁶

IV. THE VIRTUE¹⁷ OF CODIFIED ETHICS RULES

Shaffer's criticisms carry weight, and they are certainly plausible. Codifying standards of conduct and treating ethics as a field of legal regulation may in fact induce lawyers to abdicate moral responsibility for their actions on behalf of clients. However, at least¹⁸ five arguments can be offered in defense of the

13. Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605, 606-07 (1996). See also THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS 2 (1987) ("[S]o much of what is said in professional societies and taught in professional schools is manifestly aimless. There must be more to it than *that*.").

14. Thomas L. Shaffer, *On Religious Legal Ethics*, 35 CATH. LAW. 393, 397 (1994).

15. Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181, 223 (1981).

16. Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as Moral Argument*, 26 GONZ. L. REV. 393, 402-03 (1991).

17. The word "virtue" is used here in an ordinary sense to mean "any good quality" or "merit." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 2042 (2d ed. 1983). In other contexts, "virtue" can be given a more specialized meaning. See, e.g., Shaffer, *supra* note 16, at 396-97 (discussing "virtue words" and the ways in which virtues are learned and perfected).

18. There are other perspectives on the advantages of ethics codes for lawyers. See, e.g., WOLFRAM, *supra* note 6, at 48-49 (1986) (discussing the purpose and function of lawyer codes); Richard Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981) (arguing that lawyers' ethics rules legitimate the role of elite lawyers and are a form of market control); Deborah Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981) (asserting that codes protect lawyers' interests in public

codification of professional ethics. The first focuses on client protection, the second on equality of client treatment, the third on promotion of ethical discourse, the fourth on the symbolic value of declarations of principle, and the fifth on re-examination of previous ethical choices.

A. *Client Protection*

It has long been noted that consumers of legal services are often in a poor position to protect their own interests.¹⁹ Yet their interests may be greatly affected by the ethical decisions that lawyers make incidental to the practice of law. How a lawyer deals with confidential information,²⁰ treats client property,²¹ or handles conflicting interests²² can seriously affect the fortunes of a client and the value of the services that are rendered. The same is true with respect to numerous other ethical issues, such as communication of information to the client,²³ acceptance or rejection of settlement offers,²⁴ disclosure of falsity by a client,²⁵ and business transactions between lawyer and client,²⁶ to mention but a few.

It is reasonable to assume that in seeking the assistance of counsel, many clients would not anticipate the need to address such matters. Indeed, it is often the case that persons seeking counsel, far from being careful, methodical, rational decision-makers, are impaired in judgment by the very plight which has created the need for legal assistance.²⁷ Surely this is often the

esteem, minimize economic competition, and reinforce the perception that the adversarial system accomplishes justice).

19. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-4 (1980) ("A layperson who seeks legal services often is not in a position to judge whether he will receive proper professional attention.").

20. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (dealing with confidentiality of information).

21. See *id.* Rule 1.15 (dealing with safekeeping of client property).

22. See *id.* Rules 1.7-1.12 (dealing with conflicts of interest).

23. See *id.* Rule 1.4 (dealing with the duty of communication).

24. See *id.* Rule 1.4 cmt.1 (discussing duty to communicate settlement offers).

25. See *id.* Rule 3.3 (discussing the duty of candor to a tribunal); *id.* at Rule 4.1 (discussing duty of truthfulness in statements to others).

26. See *id.* Rule 1.8 (discussing the permissibility of business transactions between lawyers and clients).

27. But see Vincent Robert Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 42 (1988) (suggesting that for purposes of the anti-solicitation rule a distinction might be drawn between "ambulance-chasing," which often involves the pressured confrontation of injured or distressed victims of misfor-

case for clients who are victims of injury or accused of crime.²⁸ Furthermore, even if a client is sufficiently prescient to anticipate the range of ethical issues that should be addressed, there is reason to think that in dealing with professionals many laypersons will lack the confidence to raise those issues²⁹ or the ability to provide instructions as to how such matters should be handled.

Given these realities, codes of ethics serve a consumer-protection function.³⁰ They ensure that the ethical issues most likely to arise in legal representation have been anticipated and that standards for performance have been articulated. Of course, whether consumers are actually protected depends upon the substance of the codified rules.³¹ If, however, the rules are reasonable and appropriately enforced, clients are likely to be safeguarded from risks against which they need protection. Thus, rules of ethics tend to ensure a certain minimum level of performance in the handling of client affairs. Though perhaps less lofty than other objectives to which the profession may aspire, the goal of consumer protection is one that would be regarded as worthy by many individuals, at least those whose interests are at stake in the legal system.

B. *Equality of Client Treatment*

Justifying ethics rules based on equality of treatment is different from arguing for client-protection. Whereas the latter is

tune, [and] the regular clients of a departing attorney [who] are typically not grief-ridden individuals awash in a sea of recent tragedy").

28. Cf. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465 (1978) (In upholding a prophylactic ban against lawyer in-person solicitation in a case involving contact with an accident victim, the court noted that "the very plight of . . . [an accident victim] not only makes him more vulnerable to influence but also may make advice all the more intrusive"). See also Vincent R. Johnson, *The Ethics of Communicating with Putative Class Members*, 17 REV. LITIG. 497, 513-14 (1998) (discussing the risk that insurance company adjusters seeking quick settlements may overreach tort victims).

29. See THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 87-88 (3d ed. 1997) (discussing client dependence).

30. See WOLFRAM, *supra* note 6, at 49 (stating a consumer-protection rationale for professional codes).

31. Some ethics rules appear to be more concerned with protecting the interests of the attorney rather than the interests of the client. The rule against directly communicating with a represented person may fall into this category. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983). The prohibition imposed by Rule 4.2 cannot be waived by the affected client, even if the client initiates the communication. Only the client's attorney, who has a financial interest in preventing disruption of the relationship, can consent to direct communication with the client. See Johnson, *supra* note 28 (discussing alternative rationales for represented-person rule).

concerned with preventing error or abuse, the former is concerned with parity.

In a given situation, more than one course may be reasonable. This is as true in the practice of law as it is with respect to driving a car, teaching a class, or managing a household. In the absence of codified standards identifying which of several reasonable solutions is the "right" answer to a recurring ethical dilemma, there is a risk in law practice that similarly situated clients will be treated differently. The danger here is not that a client will be harmed by a bad decision (assuming that one of several reasonable courses has been chosen), but rather that the client may be (or feel) wronged by reason of having been accorded disparate treatment—treatment perhaps less advantageous than another reasonable course followed in similar circumstances by a different lawyer or by the same lawyer in another case.

The risk posed by disparate ethical decisions is more substantial than might first appear. In contemporary America, equal treatment is highly prized,³² as is reflected by the ubiquitous invocations of "equal protection," "equal justice under law" and "equal opportunity."³³ Indeed, in the public sector, anything which gives one person a competitive advantage over another in pursuing the benefits and resources that government can provide is ethically suspect.³⁴ "Many Americans today expect that

32. See Shaffer, *supra* note 16, at 398 (referring to the "popular American value of equality").

33. A search on September 4, 1999, of the Westlaw ALLCASES database, covering the one-year period between September 1, 1998 to August 31, 1999, revealed that 3,091 cases contained the phrase "equal protection" and 309 cases contained the words "equal opportunity." Interestingly, during that same period, the phrase "equal justice under law" appeared in only one case, but the same search in the ALLNEWS database showed that 279 articles used those words.

34. Some city ethics codes address the subject directly. For example, the Dallas code states:

Sec. 3-122. Standards of Conduct.

(a) An officer or employee of the city shall not:

....

(2) Use his official position to secure special privileges or exemptions for himself or others.

(3) Grant any special consideration, treatment or advantage to a person or organization beyond that which is available to every other person or organization. . . .

DALLAS, TEX., CITY CODE art. XII § 3-122 (1998). The San Antonio Ethics Code states in relevant part:

Sec. 2-44. Unfair Advancement of Private Interests

(a) General Rule. A city official or employee may not use his or her official position to unfairly advance or impede private inter-

law *can, should, and will be used* to assure a level playing field in public life by eliminating, insofar as possible, any unfair advantage that might be gained through the use of special connections to those who exercise the power of government."³⁵ So too, in the law school environment, students care deeply about whether they are treated the same as other students, regardless of whether there is more than one reasonable response to a given set of facts.³⁶

On an individual level, disparate treatment of clients whose affairs raise similar ethical questions causes clients to feel personally aggrieved, unjustly treated. Disciplinary complaints and malpractice suits are only two of the more obvious potential consequences of such feelings.³⁷ On a systemic level, disparities in the handling of ethical issues can produce diminished respect for the legal profession. Of course, all of these consequences have a corrosive effect on public confidence in the justice system. For that reason alone, unnecessary disparity should be avoided.³⁸

The problems posed by disparate ethical decisions are particularly keen if legal services are rendered by a large number of lawyers, if lawyers are drawn from divergent moral traditions, and if information about disparate treatment is susceptible to wide and rapid dissemination. All of these circumstances prevail in contemporary America.

ests, or to grant or secure, or attempt to grant or secure, for any person (including himself or herself) any form of special consideration, treatment, exemption, or advantage beyond that which is lawfully available to other persons.

SAN ANTONIO, TEX., CODE ART. III § 2-44 (1999).

35. Johnson, *supra* note 4, at 724.

36. In this respect, law students are no different from Americans generally. Americans, perhaps unwisely, like standardization and predictability. Codified professional norms tend to produce just those results. *See id.* at 749-50 (discussing how the development of a consumerism mentality in America has catalyzed calls for ethics in government).

37. *See* Anne E. Thar, *Update Your Practice to Avoid Malpractice Claims*, 83 ILL. B.J. 427, 428 (1995) ("The only element common to all malpractice claims is an unhappy client. More often than not, the client is not dissatisfied with the legal work but with the treatment he or she received from the attorney."); *see also id.* at 427 ("The ABA's groundbreaking study in the early 1980s on the causes of legal malpractice revealed that fewer than half of all claims nationwide result from a 'substantive' error."); Anne E. Thar, *12 Steps to Prepare Your Practice for the New Millennium*, 86 ILL. B.J. 695, 695 (1998) (discussing ethical and malpractice risk management, Thar writes, "[C]lient surveys consistently show that our clients rate a lawyer's legal prowess and intelligence at the bottom of the priority list.").

38. *See* *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (recognizing that the "bar has a substantial interest in . . . preventing the erosion of confidence in the legal profession").

The American legal profession is currently surging toward a million members in size.³⁹ This figure reflects vast recent increases in both the number and diversity of lawyers. As late as 1960, there were only 285,000 lawyers in the United States,⁴⁰ the overwhelming majority of whom were white and male.⁴¹ To a large extent, lawyers of that era shared common values, whether because of similar educational or ethnic backgrounds,⁴² common social activities,⁴³ or the relative lack of professional mobility.⁴⁴

During the past thirty years, due in large part to the achievements of the movements for civil rights, equal rights, and individual rights, the composition and nature of the profession have changed dramatically. Today, the profession is more diverse in terms of race, ethnicity, and gender than ever before.⁴⁵ At the

39. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 417 tbl.672 (1998) (stating that in 1997 there were 925,000 lawyers and judges who were employed).

40. See Julie Taylor, *Demographics of the American Legal Profession* (1983), in GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 53 (2d ed. 1988) (noting the dramatic increase in the number of lawyers during the first four score of the twentieth century and stating the size of the American profession as follows: 1900, 115,000; 1945, 198,000; 1960, 285,000; 1970, 355,000; 1975, 456,000; 1982, 585,000). "The number of lawyers doubled in the twenty years from 1960-1980—an increase of 100%." *Id.* at 53.

41. Cf. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 25 (1991) (discussing traditional big-firm preference for "lawyers who are Nordic").

42. See *id.* at 25 (discussing the hiring preference of large firms, circa 1960, for white, Christian males who graduated from the "right" schools).

43. Cf. *id.* (discussing the traditional preference of large law firms for lawyers with the "'right' social background").

44. See *id.* at 23-24 (discussing the "golden age" of the big law firm, circa 1960, the authors write, "Partners might leave and firms might split up, but it didn't happen very often.").

45. See Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359, 360-61 (1990) (citing authorities for the proposition that "women and minorities comprise increasingly larger percentages of law school graduates, practitioners and the academic bar"); Mark Hansen, *And Still Miles to Go*, NAT'L BAR ASS'N MAG., Jan.-Feb. 1999, at 40 (according to the 1998 report of the ABA Commission on Opportunities for Minorities in the Profession, "minorities made up some 7.5 percent of the nation's lawyers in 1990, an increase from about 5 percent in 1980" and "minority representation among law students increased to nearly 20 percent by 1996"); Ritchenya A. Shepard, *Top In-House Women Gain Ground*, NAT'L L.J., Sept. 6, 1999, at B4 ("The number of women general counsel leading Fortune 500 legal departments has doubled in the past three years."); Compare Michael D. Goldhaber, *Black Lawyers: Lonely at the Bottom*, NAT'L L.J., Apr. 12, 1999, at A16 (citing a poll in which "three-fourths of black lawyers agree with the statement that law firms offer 'tokenism,' and only

same time, many of the social institutions which previously exerted powerful influences over common life—such as religious institutions,⁴⁶ political parties,⁴⁷ and labor unions⁴⁸—have declined in force. There is also greater mobility⁴⁹ and faster dissemination of information⁵⁰ than at any time in American history.

It is difficult to identify today any source of moral beliefs shared throughout the legal profession. Religion? Ancestry? Patriotism? Professionalism? Each of these influences undoubtedly plays an important role in the lives and actions of many lawyers. But, far from being sources of pervasively shared values, their mere mention in one quarter is controversial in another. Putting the point sharply, Tom Shaffer has written: "Americans do not have a common idea of what a good person is. Our common ethic is not an ethic at all; it is the insertion of a referee in a game in which the only rule is that every person is his own tyrant."⁵¹

8% see a genuine quest for diversity"). *with* Geoffrey G. Hazard, Jr., *How Come We're Happy?*, N.Y.U. L.J., Apr. 26, 1999, at A18 (reporting a high level of job satisfaction among lawyers generally and noting that "there were no major differences in reported job satisfaction among women and minority lawyers").

46. See Richard John Neuhaus, *The New Face of American Churches*, WALL ST. J., Mar. 9, 1988, at 24, (noting "steep decline of . . . [mainstream] churches in numbers and influence").

47. See Gerald F. Seib, *Election Overload: Voters in California Offer Rest of Nation Some Political Lessons*, WALL ST. J., Nov. 1, 1994, at A1 (discussing declining influence of political parties).

48. See *Politicizing Pensions*, WALL ST. J., Aug. 17, 1989, A1 (noting declining influence of labor unions).

49. The growth in lawyer mobility has been particularly striking. "Lawyers in the past spent their entire careers with the same firm." Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 818 (1998). However, by the end of the twentieth century, the same practice had become quite uncommon. "Each year thousands of law firm associates leave the firms for which they have worked, and then continue to practice law, either on their own or with other attorneys." Johnson, *supra* note 27, at 4. "Partners in law firms have become increasingly 'mobile,' feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them." William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 152 (1986).

50. See *The Most Influential Innovations of the Millennium*, WALL ST. J., Jan. 11, 1999, at A14 ("The fourth information revolution is now sweeping the world.").

51. Shaffer, *supra* note 14, at 398. Continuing the argument, Shaffer says: Most of the discussion I hear concerning legal ethics . . . is that a good person is one who is free to choose whatever he or she wants. If there are moral restraints on the choices people make, and the restraints are

Absent a common shared moral tradition,⁵² it is unrealistic to think that a million lawyers, independently resolving the ethical questions that arise in the practice of law, would arrive at the same answers. If clients are to be afforded reasonably equal treatment by the lawyers who serve them, the existence of ethics codes is indispensable. Resolving ethical questions by reference to a code may offer little opportunity for moral growth on the part of lawyers, but it holds fair promise for ensuring equality of client treatment.

C. *Promotion of Ethical Discourse*

If ethics codes in the legal profession tempt lawyers to let others do their ethical reasoning for them, they offer that inducement in a context which often involves at least some members of the profession in a high level of ethical debate. The deliberations attending the promulgation and implementation of the provisions in the Model Rules of Professional Conduct dealing with the confidentiality of information relating to client perjury or otherwise fraudulent conduct are excellent examples. Those issues were exhaustively examined in a multitude of fora, and the debates involved and attracted the attention of a wide segment of the profession.⁵³ So thoroughly were the issues of perjury and client fraud considered that it is difficult to imagine that any important perspective was unrepresented.⁵⁴ Often, the deliberations focused not on legal technicalities, but on substan-

beneficial, they seem to be systemic restraints that are necessary to processes that protect each person's freedom of choice

Id.; see also *id.* at 396 n.16 (quoting Tom Buford, a teacher of religious ethics at Furman University, as stating, "[A]n important characteristic of the twentieth century is that there is no generally agreed upon ultimate principle, body of knowledge, or power . . . to which all of us ought appeal in settling disputes among competing goods to determine which is correct.").

52. Cf. Sarat, *supra* note 49, at 827 ("When they were asked to discuss their own standards and aspirations as professionals and whether their standards were widely shared in the firms where they worked, most associates were unable to identify with confidence the shared norms or aspirations of the firms.").

53. See, e.g., Kenneth Krach, *The Client-Fraud Dilemma: A Need for Consensus*, 46 MD. L. REV. 436 (1986) (concluding that the ABA should re-evaluate its position on attorney-client confidentiality); Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521 (1988) (discussing the position of the Model Rules on perjury).

54. "[T]he problem of the perjurious defendant is one that has attracted the attention of a small army of . . . commentators." *Maddox v. State*, 613 S.W.2d 275, 279 (Tex. Ct. App. 1981).

tial moral principles.⁵⁵ The legal profession benefitted from that laborious process. And, arguably, the deliberations on these issues were more robust, well-informed, and extensive than would ever have been the case in the absence of a codification project.

Of course, not all codification efforts have the moral weight of the debates over perjury and fraud. The recent fussing over how to write provisions relating to the Internet into the ethics rules on lawyer advertising is an excellent example of the other end of the spectrum.⁵⁶ However, the mere fact that some code provisions do not deal with genuine "ethical" issues does not mean that the rules that do trivialize the ethical decisionmaking process. Rules in the latter category invite attention to, and careful consideration of, matters which might otherwise go unaddressed.

Of course, some members of the profession, knowing that a codification effort is underway, may sit idly on the sideline awaiting word from "on high." In that sense, the drafting or reforming of a code may discourage individual consideration or discussion of the issues in question. The bystander may reason that since someone is taking care of the matter, there is no need to get involved. It is impossible to say whether this risk of discouraging ethical discourse outweighs the tendency of codification efforts to promote ethical discussion because of their visibility and apparent importance.

Undoubtedly, codification of professional norms changes the nature of ethical discussion. First, in a codified world, the process of ethical deliberation—which in many respects relates to the adoption and teaching of such codes—tends to be a public process, rather than a private one. Second, to the extent that ethical questions are "resolved" by mandatory codified standards, there are fewer matters left open for individual resolution. These realities may entail significant consequences. One group

55. See, e.g., THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 97-99 (1981) (discussing a proposed version of the Model Rules); Marvin E. Frankel, *Clients' Perjury and Lawyers' Options*, 1 J. INST. FOR STUDY LEGAL ETHICS 25 (1996).

56. See Amendment F: *The Internet and Other Electronic Media*, 61 TEX. B.J. 837 (1998) (detailing proposed changes in the advertising rules to include communications through media such as websites and electronic mail). Cf. David Beckman & David Hirsch, *Rules of The Road: Legal Ethics May Be Speed Bumps on the Internet Superhighway*, A.B.A. J., Sept. 1996, at 86; Regina Galindo Carter & Freddie Baird, *Spectrum: Web Ethics*, 60 TEX. B.J. 196, 196 (1997) (asserting that "[t]raditional lawyer advertising rules and regulations are quickly being adapted to evolving forms of electronic communication").

adversely affected is those who, like Shaffer,⁵⁷ seek to draw from religion ethical inspiration for the practice of law. In many public fora, religiously-based arguments are today viewed as not acceptable,⁵⁸ or at least they seem to be rare.⁵⁹ In addition, the fewer ethical matters left by codes for individual deliberation, the fewer opportunities there are for lawyers to rely on religious principles in personally resolving questions of professional ethics. Either way, religion loses. But the solution to that problem is not to eschew codification. Rather, it is to change the process of public deliberation to accommodate those values (religious or otherwise) that are thought to provide guidance.

D. *The Declarative Function of Ethics Codes*

Codification of ethics rules can perform a valuable declarative function, particularly when the rules consist not merely of prohibitions, but of statements of affirmative obligation and aspirational principles. As my colleague Geary Reamey has argued, "When we memorialize our aspirations in . . . [an ethics] code . . . we publicly proclaim, not what we are, but what we want to be, what we insist on being."⁶⁰ Similarly, when we articulate ethical obligations, we identify certain kinds of behavior as not merely desirable, but so important as to command unswerving compliance. Entirely aside from any issues of compliance or

57. See Shaffer, *supra* note 14, at 393-96:

Legal ethics has become a new and impressive mansion—a mansion with many rooms

The room I use is in the attic. It is small and easy to ignore It is the room devoted to religious legal ethics

. . . .
 . . . I tend, along with a few others, to contemplate moral propositions and quandries involving lawyers from that little room I suggest that the best way to be a lawyer and righteous at the same time is to practice law as a ministry—a religious ministry

. . . .
 . . . My purpose here is to claim legitimacy for religious legal ethics. . . .

58. See Steven D. Smith, *Augustinian Liberal*, 74 NOTRE DAME L. REV. 1673, 1673 (1999) (discussing the theory that religious belief is inadmissible in public discourse).

59. But see Laurie Goodstein, *White House Seekers Wear Faith on Sleeve and Stump*, N.Y. TIMES, Aug. 31, 1999, at A1 (reporting that candidates for the presidency are "engaging in 'God talk' that is more explicit, more intimate and more pervasive than at any time in recent decades").

60. Gerald S. Reamey, *Ethics Code Not Hollow Words*, SAN ANTONIO EXPRESS-NEWS, Feb. 4, 1998, at 5B.

enforcement, such codified statements serve valuable educational⁶¹ and inspirational functions.

The process of protecting civil rights often begins with a statement, such as a constitution, affirming the very existence and importance of those rights.⁶² So too, ethical conduct can, and often does, begin with a statement in an ethics code identifying what types of conduct are prohibited, desirable, or required. There is no reason to conclude that promulgation of an ethics code marks the end of efforts to live ethically, any more than the drafting of a constitution necessarily terminates the efforts of a society to act civilly.

A profession unwilling to state its principles in clear written form is probably not a profession at all.⁶³ Scholars have long noted that one of the things that sets a profession apart from other callings, is the existence of a body of professional norms to guide the provision of specialized services. A profession, by definition, must declare the principles for which it stands.

E. *Reconsideration of Ethical Choices*

Another advantage of codified professional ethics rules is that a code, by its very nature, invites re-examination of the choices of principle embodied in the code.⁶⁴ The terms of

61. See WOLFRAM, *supra* note 6, at 54:

A code of rules that is clear and fair can serve an important educational role by instructing receptive readers on what is considered right and wrong. Even initially resistant members of the profession may alter their behavior, not only from fear of enforcement, but from a broader realization of the implications of their actions.

62. Cf. Vincent Robert Johnson, *The French Declaration of the Rights of Man and Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 B.C. INT'L & COMP. L. REV. 1, 32 (1990):

To focus on the [Reign of] Terror to the neglect of the Declaration of Rights itself would be to obscure the importance of publicly articulating basic civil rights. The Declaration of Rights had dared to proclaim in ringing terms what few documents had ever before stated. In so doing, the Declaration of Rights bore witness to what much of the world now recognizes as self-evident, inalienable, basic civil rights. The Declaration of Rights raised the sights of countless thousands, in France and elsewhere, toward the prospect of a better, more decent way of life. While it may be true that today "bills of rights are a dime a dozen," that was not true in 1789. As the French revolutionaries well recognized, any sincere effort to protect civil rights must begin with their articulation—that quintessentially human act of daring to say that they exist and are important.

63. See WOLFRAM, *supra* note 6, at 48 ("Today a code of ethics is required regalia for an occupational group that aspires to professional status.").

64. See, e.g., Symposium, *A Decade After the Model Rules*, 6 GEO. J. LEGAL ETHICS 799 (1993).

existing rules focus the discussion and provide targets for deliberation.⁶⁵ Criticism of those rules then informs future choices on whether prior decisions about principles should be reaffirmed or changed.

To be sure, many professionals, such as lawyers subject to ethics codes, may be interested in nothing more than the most painless path to compliance. However, others inevitably are moved to question a stated norm. The process of re-examination, particularly when conducted in public and subject to the watchful eye of disinterested parties, is natural and healthy.

The same opportunities are frequently not present when ethical decision-making is predominantly individualized. Of course, the individual decision-maker normally is in an excellent position to reconsider his or her past choices. But others, especially those who are in a position to be more objective, typically lack the familiarity with the facts that would enable them to offer insight. It is the rare case where a personal ethical decision attracts widespread attention and comment, and absent such scrutiny the process of ethical re-evaluation is likely to be less well informed or robust.

V. THE LIMITS OF CODIFIED RULES

Notwithstanding the preceding arguments, there are limits to what can be achieved by a code of professional ethics due to the nature of language, the wide range of professional conduct, the difficulty of integrating moral principles into disciplinary standards, and the process of compromise that attends the enactment of a code.

A. *The Nature of Language*

It is exceedingly difficult to write an ethics code with the just the right level of detail. Simple rules are often insufficient to deal with complex situations. And complex rules cannot be adequately communicated, remembered, or enforced.

An example of the former is Model Rule 8.04(c). With certainty and simplicity, the rule declares that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."⁶⁶ But it takes only a moment to ask whether the rule covers all forms of misrepresentation—not just deliberate

65. See, e.g., Robert A. Stein, *Updating Our Ethics Rules*, A.B.A. J., Aug. 1998, at 104 (discussing "a comprehensive review and evaluation of the ABA Model Rules of Professional Conduct in light of developments in the legal profession and society since the model rules were adopted in 1983").

66. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1983).

misstatements, but also negligent and innocent ones as well. With that simple question, much of the clarity of the rule dissolves.⁶⁷

In contrast, the Model Rules' conflict-of-interest provisions⁶⁸ are anything but simple. Intricately drafted, finely nuanced, and exhaustive (or at least exhausting), the conflict-of-interest rules often generate uncertainty in the minds of those seeking to follow or apply them. They lend themselves to neither education nor enforcement.

At a minimum, an ethics rule should be understandable, memorable, predictable, and capable of efficient enforcement. Unfortunately, the nature of language and the uncertainties of life make those simple objectives frequently unobtainable.

B. *The Range of Professional Conduct*

Lawyers engage in a wide range of professional conduct, the nature and complexity of which it is difficult to anticipate. Naturally, the ethical issues that lawyers encounter cover an equally broad spectrum, and many times those issues are difficult to foresee. However, an ethics code that fails to anticipate and address potential problems fully may do more to engender public and professional cynicism than to elevate the tone of practice or to inspire confidence among the citizenry.

As far as a regulatory document is concerned, no criticism so discredits its content as the charge that the document contains "loopholes." Such allegations, even if unwarranted, call into question not merely the substance of the enactment, but the competence of the drafters and the value of the project at all.

Unfortunately, even the most careful drafting cannot anticipate all problems. A good example can be drawn from the field of government service. In San Antonio, Texas, the nation's eighth largest city, I led a blue-ribbon panel of academics, civic activists, and public servants in the task of reforming the city's ethics code. As part of a process which spanned more than eighteen months and forty meetings, under the scrutiny of widespread

67. The language of Rule 8.4(c) is identical to that contained in the earlier MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (1980) and that found in the ethics codes of many states. Decisions interpreting this language have routinely required proof of intentional deception; a finding of innocent misrepresentation, or even negligent conduct, will not support the conclusion that the rule has been violated. *See, e.g., State Bar of Tex. v. Lerner*, 859 S.W.2d 496 (Tex. Ct. App. 1993).

68. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-1.12 (1983).

media attention,⁶⁹ the task force studied model enactments, related state and federal statutes, and legal commentary. Every provision contained in the ethics codes of eight other major cities⁷⁰ was specifically considered by the group, and based upon the task force's recommendations, a new ethics code was enacted in November 1998 to cover more than 11,000 city officials and employees and persons doing business with the city. In particular, the code contained rules governing lobbyists far more extensive than any I am aware of in any American city. One might have thought that the new code, which quadrupled the length of the city's prior ethics law, was comprehensive. But when the first case arose under the new law, the case presented an issue which none of the drafters had anticipated: the permissibility of a part-time state legislator acting as a lobbyist before the city and using the prestige of his state office for the benefit of private interests.⁷¹ While many contended that the conduct was wrong, there was nothing in the code that specifically addressed the issue.

Presumably, all ethics codes face a similar problem. The varieties of human conduct are so diverse and difficult to forecast that no ethics code can fully anticipate all of the serious issues that are likely to arise. To put it a bit more colorfully, as Geary Reamey has said, "even highly skilled wordsmiths and astute students of political anthropology fail to anticipate every possible way in which creatively unscrupulous people can slide around and through the most tightly knit law."⁷²

C. *The Difficulty of Integrating Moral Principles with Mandatory Standards*

Moral principles speak in terms of what an individual "ought" to do. They challenge a person to do the "right" thing, but in the end the decision on what will be done is left to the individual. In contrast to moral principles, laws focus on what "must" be done. There is no room for the exercise of discretion; all persons within the terms of the law must comply.

69. See Johnson, *supra* note 4, at 719 n.8 (listing numerous examples of newspaper coverage).

70. Austin, Dallas, Houston, Indianapolis, Milwaukee, Minneapolis, Phoenix, and San Jose.

71. See Christopher Anderson, *Mayor Calls for Curb on Lobbyists*, SAN ANTONIO EXPRESS-NEWS, Apr. 14, 1999, at 1B (discussing concern about "the influence and propriety of state legislators who lobby for pay at the local level."); Christopher Anderson, *Records Show Pair Didn't File as Lobbyists*, SAN ANTONIO EXPRESS-NEWS, Mar. 4, 1999, at 1B (discussing lobbying efforts by "one of the most influential members of the Legislature").

72. Reamey, *supra* note 60, at 5B.

Owing to the considerable difference between "ought" and "must," it is difficult to integrate moral principles into an ethics code comprised mainly of rules that are intended to be enforced as a form of law. Yet without "background" moral principles that can be used to fill the gaps that arise from inevitably imperfect rules or as aids to interpretation, mandatory ethics code provisions quickly degenerate into mere legalisms.

The Model Code of Professional Responsibility, promulgated in 1969,⁷³ used a format that embraced both aspirational principles and mandatory standards. In each of the nine chapters of the Code (which were called Canons), there was a set of aspirational principles, called Ethical Considerations (ECs), and a set of mandatory standards, called Disciplinary Rules (DRs). The ECs had the flavor of moral principles; they attempted to identify the goals toward which a good lawyer should strive. The DRs were enforceable legal standards; they stated what every lawyer must do under pain of professional discipline. The EC/DR format was really quite useful. The DRs identified what types of conduct were minimally acceptable, and the ECs encouraged lawyers to strive for a much higher level of performance. It was clear from the format of the Model Code that moral principles had relevance to the practice of law.

The Code was widely adopted in the early 1970s,⁷⁴ but soon attracted criticism on a number of grounds. It was urged that the substantive rules of the Code were out of date (for example, with respect to constitutional developments in the field of free speech), that they failed to address important facets of law practice (for example, the ethical obligations of attorneys representing entities, the government, or pro bono clients), and that they were less than clear in dealing with some key matters (for example, conflicts of interest).⁷⁵ Unfortunately, the format of the Code was also criticized as too confusing,⁷⁶ although it is difficult to see the basis for that claim.

73. See Johnson, *supra* note 27, at 17-18 (discussing the ABA's adoption of the Model Code in 1969 and its later replacement by the Model Rules).

74. During the years immediately following its adoption by the American Bar Association, the Model Code was enacted, officially or unofficially, in every jurisdiction, generally with few modifications. See WOLFRAM, *supra* note 6, at 56-57.

75. See WOLFRAM, *supra* note 6, at 61 (discussing critiques of the 1969 Model Code).

76. See Smith, *supra* note 5, at 155 ("the Model Code has been criticized for straddling 'the uncomfortable fence between a creed-like system and a code-like system' and for displaying an awkward ambivalence on the issue of whether to wholly depart from aspiration and turn instead to minimum enforceable standards").

When the Code was replaced in 1983 as pattern legislation by the Model Rules of Professional Conduct, EC-DR format was abandoned.⁷⁷ The Model Rules are drafted in the style of the American Law Institute Restatements. Each topic is addressed by a blackletter rule, which typically speaks in mandatory terms, and each blackletter rule is followed by a substantive comment clarifying the reach of the rule. The Model Rules contain very little aspirational content and few, if any, statements of moral principle.⁷⁸ The format of the Model Rules suggests that lawyers should be concerned with legality, not morality. Of course, that disconnection of "must" and "ought" makes it easier for lawyers to ignore the moral consequences of their actions. Denial of responsibility for what a client is doing is facilitated, and that in turn increases the risk of incivility.⁷⁹

It may be coincidence, but the adoption of the Model Rules at the state level roughly coincided with the advent of what is sometimes called "Rambo" litigation,⁸⁰ the use of ethics rules as weapons for private advantage in aggressive litigation. Unconstrained by statements of moral principle, the provisions of the Model Rules were (and continue to be) invoked for purposes of

77. See John Gibeaut, *Doing the Right Thing: Lawyers May Have to Look Beyond Conduct Rules for Ethics Answers*, A.B.A. J., July 1997, at 98.

In 1983, the ABA adopted the Model Rules of Professional Conduct in an effort to provide clearer ethics guideposts to replace the Model Code of Professional Responsibility. . . . Gone from the Model Rules were the ethical considerations that figured prominently behind the code's disciplinary rules. Most states today have adopted significant portions of the Model Rules.

78. "The Model Rules begin with a *Preamble* that . . . alludes to the necessity that a lawyer consider moral and other considerations in making discretionary professional decisions." WOLFRAM, *supra* note 6, at 63.

79. See Sarat, *supra* note 49, at 827.

In the accounts of most of the lawyers and judges with whom we spoke two things stand out: first, ethical problems are not high on their list of concerns; second, when breaches occur, responsibility for incivility and for professional deviance is placed elsewhere—by large-firm lawyers on plaintiffs' lawyers, in-house counsel, and judges; by plaintiffs' lawyers on defendants and their lawyers who allegedly routinely hide documents and abuse discovery and on a "defense oriented" judiciary; by in-house counsel on plaintiffs' lawyers who file frivolous cases and use discovery as fishing expeditions, on large firms that are reluctant to take risks and that are too interested in protecting their own privileges; and by judges on lawyers who do not take their professional obligations seriously enough and on appellate courts that routinely undo whatever trial judges try to do to manage the discovery process.

80. See Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990) (discussing the preference for melodramatic performances by trial lawyers and the growing intolerance of such techniques); Smith, *supra* note 5, at 158.

partisan advantage.⁸¹ One response has been the adoption in many jurisdictions of civility codes.⁸² These codes of professional courtesy typically attempt to resurrect aspirational principles of the type of that were once found in the Model Code. Although well intended in their inception, it is doubtful that the new civility codes have much impact on the actual practice of law.⁸³ These hoary statements of good practice probably do not receive much attention in law school classes, and lawyers faced with an ethical dilemma probably do not turn to the civility code rather than to the disciplinary rules. The lesson would seem to be that it is difficult to integrate moral principles into disciplinary standards, and that once such content is removed it cannot easily be put back.

D. *Compromises Attending Enactment*

The effectiveness of an ethics codes can be seriously limited by compromises made in the adoption process. Not all persons who participate in such efforts are actuated by the common good. "[P]rofessional codes . . . [may] be the products of grasping and selfish motivations, based on anticompetitive or class-based animus."⁸⁴ In the case of lawyer codes, the drafting process frequently involves "turf wars" between members of the defense bar and the plaintiffs' bar, between attorneys in large firms and those in smaller practices, and between newcomers

81. Cf. Gibeaut, *supra* note 77.

[A]re the Model Rules doing the job? They may be more clear-cut than their predecessors, but that also may be their undoing. Indeed, the rules themselves may need another look because they have caused many lawyers to drift from ethical deliberations over their professional conduct to "technocratic lawyering" in efforts to get around specific rules, said Heidi Li Feldman, a professor at the University of Michigan Law School in Ann Arbor.

"It's like bait," Feldman said. "You dangle a code in front of lawyers, and they immediately start fishing for loopholes."

Id. at 98; Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEN. TECH L. REV. 811, 812-13 (1998) (referring to "the 'scorched earth' tactics that became commonplace in the late 1980s and early 1990s in certain fields of civil litigation" and related developments involving abusive criticism of judges in the 1990s).

82. See Smith, *supra* note 5, at 156-60 (discussing the movement toward civility codes); see also Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994).

83. See Smith, *supra* note 5, at 153 (1998) (noting that civility codes "that are not merely redundant [of disciplinary rules] have been drafted and implemented ineffectively").

84. WOLFRAM, *supra* note 6, at 48.

and established practitioners, to mention only a few of the fault lines.

In addition, codification is often an exercise in lowering expectations. As Professor Charles Wolfman has remarked:

Drafting is inherently a process of finding the lowest common denominator. A realist drafting a lawyer code must be reluctant to draft strong or radical provisions for fear that a powerful segment of lawyers will find them too odious or unprofitable. . . . [T]he area left for regulation is a relatively narrow range that falls between marginal enforceable rules and insubstantial rules.⁸⁵

The rules that emerge from a partisan drafting process may be seriously infirm.⁸⁶ Because the provisions in modern ethics codes are typically mandatory, a defective rule, rather than helping an attorney to do the right thing, may make doing so more difficult or impossible. In such circumstances, the lawyer (and probably the client) would be better off without any ethics rule at all.

CONCLUSION

Tom Shaffer may be right. Ethics codes may indeed tempt lawyers to let others do their ethical thinking for them and to eschew responsibility for the actions they take.⁸⁷ But even if that is true, it would be neither wise nor feasible for the profession to dispense with such formulations. Lawyers' ethics codes provide an important basis for the equitable delivery of legal services and a valuable tool for stating professional aspirations, re-examining ethical choices, and promoting open discussion of ethical issues. In the absence of such codified standards, the ethical quality of law practice would quickly degenerate into inconsistency and unpredictability, with each of a million lawyers ruling a different fiefdom. Chaos on ethical matters would be the order of the day.

85. *Id.* at 49.

86. *Cf.* Gibeaut, *supra* note 77, at 98 (noting Professor Monroe Freedman's criticism of the Restatement, Third, of the Law Governing Lawyers: "It is tainted, I believe, by the self-interest of lawyers involved in the project.").

87. In addition, grappling with codes seems to deaden common sense. Each year, about halfway into my course on Professional Responsibility I ask my students, "Is it permissible for a lawyer to lie [for some reason or another]?" The response is always thoughtful silence, which would not have been the case on the first day of the class. The only suitable response, I find, is to indignantly bang on the table and shout, "Of course not!" That seems to have the effect of momentarily awakening the students from their code-fixation-induced stupor.

Shaffer goes a bit too far when he says that ethics rules have "very little to do with being righteous."⁸⁸ At least with respect to relations between attorney and client,⁸⁹ the lawyer codes now in force in the United States set a high standard for performance. A lawyer who complies with those provisions undoubtedly takes important steps in the direction of treating clients fairly in the best sense of the term. To the extent that Shaffer is arguing (albeit with a bit of color) that a code is only a starting point in ethical decision-making, there can be no debate. Codes are floors, not ceilings. Codified rules cannot ensure that law is practiced humanely.⁹⁰ But they can dispose of unnecessary impediments to that type of practice, as well as call lawyers to that greater goal.

As Professor Jeffrey D. Sachs recently remarked in another context, "It is in the legal realm that we find many of the deepest weakness and greatest hopes for our age."⁹¹ Thus it is not surprising that the ethics codes, which during the twentieth century became ubiquitous features of the legal profession and other callings, hold great potential for achieving important goals, and yet suffer significant limitations. The challenge, of course, is to use codified rules of ethics in a way that maximizes the former and minimizes the latter.

88. Shaffer, *supra* note 14, at 396.

89. Under standard rules of legal ethics, clients are entitled to first-class treatment. Non-clients, in contrast, are afforded only limited protection. See Vincent R. Johnson, *Ethics in Licensing*, 196 PLI PAT 463 (1997) (a "layperson [who is not a client] is entitled to common decency (e.g., the lawyer may not intentionally mislead the layperson), but otherwise is afforded little, if anything, in the way of special protection"). Not surprisingly, it is possible to argue that compliance with the usual rules leads to improper treatment of third-persons not enjoying client status. See Sarat, *supra* note 49, at 818 (quoting David Luban as stating, "The adversary system thus excuses lawyers from common moral obligations to nonclients."); W. William Hodes, *Lawyers Should Owe a Duty to Non-Clients*, NAT'L L.J., Jan. 30, 1995, at A20.

90. Cf. Gibeault, *supra* note 77, at 98:

Black-letter rules of professional conduct may not be enough by themselves to assure public confidence in the justice system.

So the profession needs to give renewed weight to a concept even more fundamental, if often elusive: ethical decision-making based on moral principles. In other words, lawyers must do the right thing.

91. Jeffrey D. Sachs, *Globalization and the Rule of Law*, YALE LAW SCHOOL OCCASIONAL PAPERS, SECOND SERIES, NO. 4, at 5 (1998).